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CHARLES ELMORE CROPLEY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

No. 275

LAWRENCE DYER,

Appellant,

vs.

CITY COUNCIL OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN; A. D. TELFER, as City Manager of the City of Beloit, Rock County, Wisconsin; R. H. CALLAND, as City Clerk of the City of Beloit, Rock County, Wisconsin; and STANLEY J. GOLDSCHMIDT, City Sanitarian of the City of Beloit, Rock County, Wisconsin,

Appellees.

Appeal From the Supreme Court of the State of Wisconsin.

Appellant's Brief

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CITY COUNCIL OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN; A. D. TELFER, as City Manager of the City of Beloit, Rock County, Wisconsin; R. H. CALLAND, as City Clerk of the City of Beloit, Rock County, Wisconsin; and STANLEY J. GOLDSCHMIDT, City Sanitarian of the City of Beloit, Rock County, Wisconsin,

Appellees.

Appeal From the Supreme Court of the State of Wisconsin.

Appellant's Brief

OPINION OF THE COURTS BELOW.

The opinion of the Supreme Court of the State of Wisconsin (R. 26-30) is reported in 250 Wis. 613, 27 N. W. (2d) 733; the opinion of the Circuit Court for Rock County is not officially reported, but is found in the record at pages 4-6.

STATEMENT OF JURISDICTION.

(a) The jurisdiction of this Court is invoked under Section 237 (a) of the Judicial Code, as amended (36 Stat. 1156, 43 Stat. 937, 45 Stat. 54, 28 U. S. C. A. 344 (a)), from a final judgment of the Supreme Court of Wisconsin entered the 10th day of June, 1947. Section 237 of the Judicial Code provides that a final judgment or decree in a suit in the highest court of a state

> "Where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal."

There was drawn in question in this case the validity, under Section 8 of Article 1 and the 14th Amendment of the Constitution of the United States, of Section 8.09 (x) (2) of the Beloit City Ordinances.

A city ordinance is a statute within the meaning of Section 237 (a) of the Judicial Code, for purpose of appeal to this court. *John P. King Mfg. Co.* v. *City Council of Augusta, et al.* 277 U. S. 100, 48 S. Ct. 489, 72 L. Ed. 801.

(b) Judgment of the Supreme Court of the State of Wisconsin was entered on June 10, 1947, (R. 26-30) and an appeal was allowed by that court to this Court on July 30, 1947.

STATEMENT OF THE CASE.

The case involves the constitutionality of Section 8.09 (x) (2) of the Beloit City Ordinances, which reads:

> "No pasteurized milk shall be sold in the City of Beloit which shall not have been pasteurized in ap-

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proved plants within six miles from the intersection of State Street and E. Grand Ave. in the City of Beloit."

The parties at the beginning of the trial made the following stipulation of facts:

"It Is Hereby Stipulated, in open court, by Lawrence Dyer, Petitioner, by McGowan, and Geffs, his attorneys, and the defendants by C. L. Haugan, City Attorney for the City of Beloit and Earl J. Caskey, their attorneys; that on the 29th day of August, 1946, the petitioner, Lawrence Dyer, made written application to the City of Beloit for a license to distribute the milk of the Dean Milk Company in the City of Beloit, and that in so doing he has complied with all of the terms of the City Ordinance in Beloit, except in the one respect, that the pasteurization plant of the Dean Milk Compnay is located at Chemung, Illinois, a distance of more than six miles from the corner of East Grand Avenue and State Street in the City of Beloit; that the pasteurization plant of the Dean Milk Company, from which the Petitioner will receive his milk for distribution in Beloit is between twenty-five and thirty miles from the point indicated by the ordinance in the City of Beloit.

"It Is Also Stipulated, that in accordance with the terms of the City Ordinance, the petitioner has filed with the City Clerk a list of the farmers who bring their milk to the Chemung dairy of the Dean Milk Company and that the number of farms so named amounts to one hundred ninety-seven; that such farms are located in the Counties of McHenry, Boone and Winnebago in the State of Illinois, and Walworth County in the State of Wisconsin.

"It Is Further Stipulated, that on the 30th day of August, 1946, the City Council of Beloit rejected the application of the petitioner for such milk license upon the ground that the pasteurization plant of the Dean Milk Company was located more than six miles

from the intersection of the two above named streets in the City of Beloit.

"It Is Further Stipulated, that it is the intention of the petitioner, in the event a license is granted to him, to obtain milk pasteurized at the factory of the Dean Milk Company at Chemung, Illinois, and to truck such milk to the City of Beloit for sale in the City of Beloit at retail stores.

"Dated this 26th day of September, 1946" (R. 8-9).

Appellant Dyer testified that the milk he proposed to sell to retail stores in Beloit was Grade A. milk and its composition qualifies as to the sanitary conditions and quality required by the Beloit City Ordinance (R. 9); that the milk is cooled to 34 degrees when it comes from the pasteurizer and placed in paper cartons; that his truck was insulated and in warm weather he used ice; that when the milk arrived at Beloit, its temperature would not be more than 42 degrees Fahrenheit; that he had occasion to check the bacteria count on this milk with the bacteria count of milk sold in Beloit, and in every instance it was lower than other milk pasteurized and sold in Beloit (R. 9-10); that this milk was sold in the City of Chicago and suburbs; that each farm which supplies milk to the Dean plant is inspected every week and sometimes twice a week by the Chicago Board of Health; that the Dean Milk Company also has its own inspectors who inspect the source of the milk at the farms; that the City of Chicago and its suburbs operate under what is known as the Model Milk Ordinance formulated by the Public Health Service of the United States; (The Model Milk Ordinance is set out in the Appendix of this brief); that the City of Chicago operates under what is known as the Mayor Kelly Milk Ordinance, which is as stringent as the Model Milk Ordinance formulated by the Public Health Service of the

United States (R. 10); that this milk is delivered to the Dean Plant the same day it is produced and would be delivered normally within two hours after being pasteurized (R. 9).

Stanley J. Goldschmidt, the City Sanitarian of Beloit, testified that he and one assistant had charge of inspecting all farms from which Grade A Milk was sold in Beloit; also the inspection of restaurants, clubs, taverns, garbage collection, 1500 people engaged in handling food, quarantine, contagious diseases, and the complaints coming into the department (R. 10-11); *that with his present staff that he could not inspect the Dean Plant and* 150 *additional sources of milk even though the plant and farms were located within six miles of Beloit* (R. 12); that there is more milk coming into Beloit every day than what local people use (R. 11); that there is no objection to the quality or sanitary condition of the milk that Mr. Dyer intends to deliver to the City of Beloit that he knew of and that he had on one or two occasions delivered it to the State Laboratory of Hygiene; that he would say it was about the average of the milk sold in Beloit, not any worse or any better (R. 12).

That his opposition to granting a license to Mr. Dyer was based upon the proposition that the pasteurization plant where he received his milk was located more than six miles from State and Grand Avenue, City of Beloit (R. 12).

That his department did not inspect dairy farms which furnished Grade B milk to Beloit (R. 11) and that farms furnishing Grade A milk were inspected twice a year (R. 12); that if this license was granted the city would have to hire another inspector (R. 12) which would cost the city $200.00 a month and traveling expenses (R. 13), but that

it would be hard to say whether the additional inspector would devote his time to inspecting additional farms without first laying out a program (R. 13).

The Milk Ordinance of the City of Beloit is set forth in the Record pages 13-23. The Ordinance makes no requirement in regard to the proximity of the sources of the milk, or dairy farms, to the City of Beloit. As to the inspection of the original sources and milk plants, the Ordinance provides:

> "(X) (6) The Health Officer or any officially appointed representative *he may so designate* shall inspect periodically *or at such time as convenient or which expediency may require*, every dairy farm producing milk and cream for consumption within the City of Beloit and all milk plants whose milk and cream are intended for consumption within the City of Beloit" (R. 22).
>
> "(X) (7) Samples of milk and cream from dairies, milk depots, stores, cafes, soda-fountains, restaurants and other places where milk products are sold shall be tested as often as the Health Officer may require. Bacteria counts and other tests shall be made in conformity with the standard methods recommended by the American Public Health Association and the Association of Official Agricultural Chemists. Tests may include such other chemical and physical determinations as the Health Officer may deem necessary for making bacterial counts and the detection of adulteration. Notices of bacterial counts shall be given to the producer or distributor concerned as soon as made. Samples may be taken by the Health Officer at any time prior to the final delivery to consumer of any milk or milk products. All dairies, milk plants, milk depots, stores, cafes, restaurants, soda-fountains and other places which shall sell or offer for sale milk or milk products in the city of Beloit shall furnish the Health Officer,

upon his request, the names and addresses of source from which their milk supply is obtained" (R. 22-23).

The Ordinance makes the following requirement *in regard to the location* of the pasteurization plant:

"(X) (2) No pasteurized milk shall be sold in the City of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State Street and E. Grand Ave., in the City of Beloit" (R. 22).

The trial court in its opinion stated:

"No objection is raised by the City as to the Grade or quality of the milk sought to be sold, *and it is conceded that the petitioner has complied with all of the terms of the Beloit Ordinance*, except in the one respect, that the pasteurization plant of the Dean Milk Company is located at Chemung, Illinois, a distance of more than six miles from the City of Beloit, *i. e.*, a distance of between twenty-five and thirty-five miles from the point indicated by the Beloit City Ordinance" (R. 5).

The trial Court ruled that the six mile requirement of the Ordinance did not deprive the appellant of his property rights and constitutional rights without due process of law, and was not an illegal interference with Interstate Commerce (R. 6).

The decision of the trial court was affirmed by the Supreme Court of the State of Wisconsin (R. 25).

SPECIFICATION OF ERRORS.

1. The Supreme Court of the State of Wisconsin erred in holding and deciding that Sec. 8.09 (X) (2) of the Beloit City Ordinance which reads:

"No pasteurized milk shall be sold in the City of Beloit which shall not have been pasteurized in ap-

> proved plants within six miles from the intersection of State Street and East Grand Avenue in the City of Beloit.",

did not deprive appellant of his property rights without due process of law, did not deprive appellant of his right of contract, and did not deny to appellant the equal protection of the laws within the meaning of section 1 of article XIV of the Amendments to the Constitution of the United States.

2. The Supreme Court of the State of Wisconsin erred in holding and deciding that said city ordinance as applied to appellant did not violate section 8, article I of the Constitution of the United States, being what is commonly called the Interstate Commerce clause of the United States Constitution.

SUMMARY OF ARGUMENT.

1. The requirement of the Beloit Ordinance that the pasteurization plant must be located within six miles of State Street and East Grand Avenue in said city prohibits interstate commerce of pure, wholesome and sanitary milk and is therefore unconstitutional.

It is conceded that appellant's milk meets all the requirements of the Beloit Milk Ordinance except it was pasteurized in a plant 25 to 35 miles from Beloit. A city or state may enact reasonable inspection laws to insure the purity of food being offered for sale within its boundaries, but a city or state may not prohibit interstate commerce in such commodities altogether even though the inspection is burdensome, and inspection at the original

source impossible from a practical standpoint. The contention that inspection of appellant's milk would cause undue hardship upon the city of Beloit because the pasteurization plant is located 25 to 35 miles from Beloit is without merit because the city's chief health officer testified that his department would be unable to inspect the additional farms and plant even if they were located within the six mile zone, and it would be a minor matter for the chief health officer to satisfy himself whether or not the inspection now being made is adequate. Inspection of appellant's sources of milk, the milk plant and transportation facilities would not be burdensome as a matter of fact.

The fact that the six mile zone covers a small portion of the State of Illinois does not make the Beloit Ordinance less objectionable as to commerce originating in Illinois more than six miles from the City of Beloit.

The City of Beloit is not at liberty to prohibit interstate commerce in the absence of congressional action. The interstate commerce clause is a grant of power to Congress to control commerce, and is a diminution *pro tanto* of absolute state sovereignty over the same subject. The very purpose of the Commerce Clause was to create an area of free trade among the several states.

2. The provision of the Beloit Ordinance which prohibits the sale of milk not pasteurized within the six mile zone is arbitrary, discriminatory, and in violation of the Fourteenth Amendment of the United States Constitution.

A city ordinance which arbitrarily draws a line around the city and prohibits the sale of milk pasteurized beyond the line under any and all circumstances and conditions

is arbitrary and discriminatory. Erection of a prohibitive trade barrier by a city deprives those who are prevented from competing in the city markets of their property and right of contract without due process of law and denies to them the equal protection of the law.

All courts of last resort in this country except the case at bar has held similar ordinances in violation of the Fourteenth Amendment. In some of the cases the burden of inspection was much more onerous than in the case at bar.

Appellant should not be denied relief because he did not offer to bear the expenses of inspection, because (1) he was denied a license on the sole ground that the pasteurization plant from which he proposed to obtain milk was located more than six miles from the City of Beloit, (2) Appellant tendered all the license fees provided for in the Ordinance and (3) Appellant has no control over staffing and regulating the Health Department of the City of Beloit.

ARGUMENT.

I.

The requirement of the Beloit Ordinance that the pasteurization plant must be located within six miles of State Street and East Grand Avenue in said city prohibits interstate commerce of pure, wholesome and sanitary milk and is therefore unconstitutional.

The trial Court stated in its opinion:

> "No objection is raised by the City as to the Grade or quality of the milk sought to be sold, and it is conceded that the petitioner has complied with all of the terms of the Beloit Ordinance, except in the one respect, that the pasteurization plant of the Dean Milk Company is located at Chemung, Illinois, a distance of more than six miles from the City of Beloit; *i. e.*, a distance of between twenty-five and thirty-five miles from the point indicated by the Beloit City Ordinance." (R. 5).

This statement in the trial Court's opinion under the Wisconsin law is equivalent to the formal Finding of Fact, *Wolfrom* v. *Anderson*, 249 Wis. 433, 25 N. W. 2d 880.

The parties stipulated in open court that the appellant had

> "Complied with all of the terms of the City Ordinance in Beloit, except in the one respect, that the pasteurization plant of the Dean Milk Company is located at Chemung, Illinois, a distance of more than six miles from the corner of East Grand Avenue and State Street in the City of Beloit" (R. 8).

The Beloit Ordinance makes no requirement as to the location of the farms where the milk is produced.

It is true that Beloit is located on the state line between Wisconsin and Illinois and that the circle with the six mile radius from East Grand Avenue and State Street includes a small portion of the State of Illinois. The six mile zone prescribed by the Beloit Ordinance prohibits the Appellant from selling pasteurized milk within the city for the sole reason that the milk was pasteurized at a plant twenty-five to thirty-five miles away from Beloit.

Both the trial court and the Supreme Court of the State of Wisconsin held that the provision for the six mile zone was a valid provision notwithstanding the Interstate Commerce Clause and the Fourteenth Amendment to the Constitution of the United States. It stands as a verity in this case that the milk which the appellant proposed to sell is pure, wholesome, sanitary and meets all the requirements prescribed by the Beloit Milk Ordinance except that it was not pasteurized within the six mile zone.

This position when applied to the appellant is a clear violation of the Interstate Commerce Clause of the United States Constitution.

In *Schollenberger* v. *Pennsylvania,* 171 U. S. 1 18 S. Ct. 757 43 L. Ed. 49 this court held a Pennsylvania Statute was in violation of the Interstate Commerce Clause of the Constitution which prohibited the introduction and sale within its borders of oleomargarine. At page 12 Mr. Justice Peckham, speaking for the majority of the Court, stated:

> "The general rule to be deduced from the decisions of this court is that a lawful article of commerce cannot be wholly excluded from importation into a state from another state where it was manufactured or grown. *A state has power to regulate*

the introduction of any article, including a food product, so as to insure purity of the article imported, but such police power does not include the total exclusion even of an article of food.

In *Minnesota* v. *Barber*, 136 U. S. 313, *it was held that an inspection law relating to an article of food was not a rightful exercise of the police power of the state if the inspection prescribed were of such a character or if it were burdened with such conditions as would wholly prevent the introduction of the sound article from other states.* This was held in relation to the slaughter of animals whose meat was to be sold as food in the state passing the so-called inspection law. The principle was affirmed in *Brimmer* v. *Rebman*, 138 U. S. 78, *and in Scott* v. *Donald*, 165 U. S. 58, 97.

Is the rule altered in a case where the inspection or analysis of the article to be imported is somewhat difficult and burdensome? Can the pure and healthy food product be totally excluded on that account? No case has gone to that extent in this court. The nearest approach to it was the case of *Peirce* v. *New Hampshire*, 46 U. S. 5 How. 504, involving the importation of intoxicating liquors. But in *Leisy* v. *Hardin*, 135 U. S. 100, the *New Hampshire* case was overruled, and it was stated by the present Chief Justice, in speaking for the court, that 'whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by state laws amounting to regulations, while they retain that character; although, at the same time, if directly dangerous in themselves, the state may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a state the power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to a majority of the people of a state, represented in the state legislature, the

power to regulate commercial intercourse between the states, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in Congress, and its possession by the latter was considered essential to that more perfect union which the Constitution was adopted to create.'

To the same effect, we think, is the case of *Hannibal & St. J. Railroad Company* v. *Husen*, 95 U. S. 465, in which it was said that 'whatever may be the power of a state over commerce that is completely internal, it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations.' The court, therefore, while conceding the right of the state to enact reasonable inspection laws to prevent the importation of diseased cattle, held the law of Missouri there under consideration to be invalid, because it prohibited absolutely the introduction of Texas cattle during the time named in the act, even though they were perfectly healthy and sound.

The court said that a state could not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce. Reasonable and appropriate laws for the inspection of articles, including food products, were admitted to be valid, but absolute prohibition of an unadulterated, healthy, and pure article has never been permitted as a remedy against the importation of that which was adulterated and therefore unhealthy or impure.

We do not think the fact that the article is subject to be adulterated by dishonest persons in the course of its manufacture, with other substances, which it is claimed may in some instances become deleterious to health, creates the right in any state through its legislature to forbid the introduction of the unadulterated article into the state. The fact that the article is liable to adulteration in the course of manufacture, and that the articles with which it may be

mixed may possibly and under some circumstances be deleterious to the health of those who consume it, is known to us by means of various references to the subject in books and encyclopaedias, but there was no affirmative evidence offered on the trial to prove the fact. From these sources of information it may be admitted that oleomargerine in the course of its manufacture may sometimes be adulterated by dishonest manufacturers with articles that possibly may become injurious to health. Conceding the fact, we yet deny the right of a state to absolutely prohibit the introduction within its borders of an article of commerce which is not adulterated and which in its pure state is healthful, simply because such an article in the course of its manufacture may be adulterated by dishonest manufacturers for purposes of fraud or illegal gains. The bad article may be prohibited, but not the pure and healthy one.

In the execution of its police powers we admit the right of the state to enact such legislation as it may deem proper, even in regard to articles of interstate commerce, for the purpose of preventing fraud or deception in the sale of any commodity and to the extent that it may be fairly necessary to prevent the introduction or sale of an adulterated article within the limits of the state. But in carrying out its purposes the state cannot absolutely prohibit the introduction within the state of an article of commerce like pure oleomargarine."

The Supreme Court of Wisconsin stated in its opinion:

"This ordinance does not violate the interstate commerce clause of the United States constitution. Milk may be furnished from farms and pasteurization plants in the state of Illinois as well as in the state of Wisconsin, and in fact milk is so furnished. The production and delivery of milk are essentially local problems with which congress has not sought to deal, leaving the city of Beloit free to act in the exercise of its police powers. *State* v. *Chicago, Mil-*

waukee & St. Paul R. Co. (1908), 136 Wis. 407, 117 N. W. 686, 19 L. R. A. (N. S.) 326; *Wadhams Oil Co.* v. *Tracy* (1909), 141 Wis. 150, 123 N. W. 785." (R. 29-30)

The above pronouncement is in conflict with the decisions of this court upon the meaning and purpose of the Interstate Commerce Clause of the Constitution of the United States. The fact that the arbitrary circle drawn by the city of Beloit around itself includes approximately one hundred fifteen square miles of territory of the State of Illinois does not meet the constitutional requirements of Commerce originating beyond the rim of the circle. If the proposition stated by the Wisconsin Court is allowed to stand then all interstate commerce in this country will soon come to an end. Any state could effectively prohibit interstate commerce by allowing importation within its borders of goods produced within a limited zone beyond its boundaries.

The second proposition of the Wisconsin Court that the city of Beloit is free to act in the absence of action by Congress is also in conflict with the decisions of this Court. This court stated in *Freeman* v. *Hewit*, ...U. S...., 67 S. Ct. 274, 276:

> "Our starting point is clear. In two recent cases we applied the principle that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the *States, but by its own force created an area of trade free from interference by the States.* In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States. *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 65 S. Ct. 1515 89 L. Ed. 1915; *Morgan* v. *Virginia*, 328 U. S. ...., 66 S. Ct. 1050. In so deciding we reaffirmed, upon fullest consideration, the course of adjudication unbroken through the Nation's history. This limitation on State power,

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as the *Morgan* case so well illustrates, does not merely forbid a State to single out interstate commerce for hostile action. A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States. It is immaterial that local commerce is subjected to a similar encumbrance. It may commend itself to a State to encourage a pastoral instead of an industrial society. That is its concern and its privilege. But to compare a State's treatment of its local trade with the exertion of its authority against commerce in the national domain is to compare incomparables.

These principles of limitation on State power apply to all State policy no matter what State interest gives rise to its legislation. A burden on interstate commerce is none the lighter and no less objectionable because it is imposed by a State under the taxing power rather than under manifestations of police power in the conventional sense." (Italics ours.)

In *Carter* v. *Commonwealth of Virginia*, 321 U. S. 131, 64 S. Ct. 464 at page 137 of U. S. Rep. and 468 of S. Ct. Rep.:

"That clause remains in the Constitution as a grant of power to Congress to control commerce and as a diminution *pro tanto* of absolute state sovereignty over the same subject."

In *Southern Pac. Co.* v. *State of Arizona*, 325 U. S. 761, 769, 65 S. Ct. 1515, 1520, this Court stated:

"For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests."

In *McLeod* v. *J. E. Dilworth Co.*, 322 U. S. 327, 330, 64 S. Ct. 1023, 1026 this Court stated:

> "The very purpose of the Commerce Clause was to create an area of free trade among the several States."

The case of *Brimmer* v. *Rebman*, 138 U. S. 78, 34 L. Ed. 862 held unconstitutional the statute of the State of Virginia which provided for inspection of meat that was transported more than one hundred miles after slaughter and for an inspection fee of one cent a pound. Rebman was convicted for the sale of meat from animals slaughtered in Illinois. The United States Supreme Court held the Virginia statute unconstitutional. The Court stated:

> "Is the Statute now before us liable to the objection that, by its necessary operation, it interferes with the enjoyment of rights granted or secured by the Constitution? This question admits of but one answer. The Statute is, in effect, a prohibition upon the sale in Virginia, of beef, veal or mutton, although entirely wholesome, if from animals slaughtered one hundred miles or over from the place of sale. We say prohibition, because the owner of such meats cannot sell them in Virginia until they are inspected there; and being required to pay the heavy charge of one cent per pound to the inspector, as his compensation, he cannot compete, upon equal terms, in the markets of that Commonwealth, with those in the same business, whose meats, of like kind, from animals slaughtered within less than one hundred miles from the place of sale, are not subjected to inspection at all. Whether there shall be inspection or not, and whether the seller shall compensate the inspector or not, is thus made to depend entirely upon the place where the animals, from which the beef, veal or mutton is taken, were slaughtered. Undoubtedly, a State may establish regulations for the protection of its people against the sale of unwholesome meats, provided such regulations do not conflict with the

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powers conferred by the Constitution upon Congress, or infringe rights granted or secured by that instrument. But it may not, under the guise of exerting its police powers, or of enacting Inspection Laws, make discriminations against the products and industries of some of the States in favor of the products and industries of its own or of other States. The owner of the meats here in question, although they were from animals slaughtered in Illinois, had the right, under the Constitution, to compete in the markets of Virginia upon terms of equality with the owners of like meats, from animals slaughtered in Virginia or elsewhere within one hundred miles from the place of sale. Any local regulation which, in terms or by its necessary operation, denies this equality in the markets of a State, is, when applied to the people and products or industries of other States, a direct burden upon commerce among the States, and therefore void."

The right of the City of Beloit to inspect appellant's milk before sale is not involved in this case. The provision of the Ordinance in question simply prohibits the sale of the milk altogether.

Beloit may regulate the introduction of a food product in such way as to insure its purity, but such power does not include the total exclusion of an article of food. 22 Am. Jur. Food Sec. 16 page 817.

The defense in this action consisted chiefly of the proposition that it was too expensive and inconvenient for the City of Beloit to inspect the additional sources of milk and the pasteurization plant from which the appellant would obtain the milk he proposed to sell. There is no objection to the purity, wholesomeness or sanitation of the milk which the appellant proposed to sell in Beloit. The objection is that the City of Beloit does not want to incur the inconvenience and expense necessary to satisfy itself that this milk does comply with the requirements of its Ordinance.

The Supreme Court of Wisconsin stated in its opinion:

> "The city of Beloit has two employees in this department, the city sanitarian and an assistant, and proof was offered that to assume the inspection of the additional plant and farms it would require the employment of another employee at a cost of $2,400 per year, and if other likewise distant plants were included it would cost much more. Convenience and efficiency are self-evident." (R. 28-29)

The record, however, shows that the city sanitarian and one assistant inspect the Grade A farms furnishing milk to Beloit about twice a year; that they inspect also 38 restaurants, 16 soda fountains, 18 light lunch establishments, 20 confectionery stores, 81 grocery and meat markets, 8 bakeries 53 taverns and clubs, 8 dairies and also supervise the collection of garbage from about 8,500 households, inspect 1,500 people engaged in handling food and also handle the daily complaints and the quarrantine of contagious diseases. In their spare time they look after the correspondence that comes into the office.

The city sanitarian also testified that if additional farms and pasteurization plants from which the appellant proposed to obtain his milk were all located within the six mile zone that he and his assistant would not have time to inspect them; an additional inspector would cost the City of Beloit about $200.00 per month plus travelling expenses and that, "it would be hard to say whether his work would be devoted to inspecting additional farms without first laying out a program." (R. 12-13)

The record shows that the farms and plant from which the appellant would obtain his milk were inspected by cities in Illinois obtaining milk from the Dean Milk Company and by the inspectors of the Dean Milk Company itself twice a week. The farms within the six mile zone furnishing Grade A milk are inspected only twice a year

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by th City of Beloit and those furnishing Grade B milk are not inspected at all.

Section 11 of the Model Milk Ordinance and Code, recommended by the United States Public Health Service and prepared by direction of the Surgeon General of the United States provides:

> "*Sec.* 11. *Milk and milk products from points beyond the limits of routine inspection.*—Milk and milk products from points beyond the limits of routine inspection of the city of ..... may not be sold in the city of ....., or its police jurisdiction, unless produced and/or pasteurized under provisions equivalent to the requirements of this ordinance: *Provided,* That the health officer shall satisfy himself that the health officer having jurisdiction over the production and processing is properly enforcing such provisions."

The provision of the Model Milk Code is perfectly reasonable and is an adequate safeguard to insure the purity and sanitation of the milk—in fact, the Beloit Milk Ordinance, Sec. (X) (6) authorizes a similar procedure. This section provides:

> "(6) The Health Officer or any officially appointed representative he may so designate shall inspect periodically or at such time as convenient or which expediency may require, every dairy farm producing milk and cream for consumption within the city of Beloit and all milk plants whose milk and cream are intended for consumption within the city of Beloit."

Section (X) (7) of the Beloit Milk Ordinance authorizes the health officer to examine samples of the milk and to make all of the tests recommended by the American Public Health Association and Association of Official Agricultural Chemists to determine the purity and sanitation of the milk.

The milk which the appellant proposed to furnish is regularly inspected twice a week both as to the sources of the milk and pasteurization plant and the means of transportation by cities with ordinances just as exacting and stringent as the Beloit City Ordinance. The city sanitarian of Beloit, with little expense and inconvenience, could easily determine whether or not this inspection was being made in the proper manner and whether or not the requirements of the Ordinances of the Illinois cities were being met.

The location of the pasteurization plant 25 or 35 miles from the City of Beloit in this day of modern roads and automobiles presents no great inconvenience. As to the inspection of the additional farms the Beloit City Ordinance prescribes no limitation as to the location of the farms; the six mile limit applies only to the pasteurization plant.

In view of the frank admission of the city sanitarian that he would be unable to inspect the additional farms and the pasteurization plant even if they were located within the six mile limit destroys the excuse that the appellant should be barred from engaging in Interstate Commerce because of the inconvenience and expense in determining whether or not his product is pure, wholesome and sanitary.

The same excuse that the city of Beloit makes was made by the State of Minnesota and denied by this Court in the case of *State of Minnesota* v. *Barber*, 136 U. S. 313, 34 L. Ed. 455. That case involved the sale of fresh meat. It is common knowledge that fresh meat is subject to contamination to an equal extent as milk. The Minnesota statute prohibited the sale of fresh meat in Minnesota unless the animal had been inspected in Minnesota before slaughter. Barber was convicted of selling meat

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in Minnesota which had been slaughtered in Illinois. The State of Minnesota argued that it could not determine whether or not the animal was healthy by merely inspecting the meat when it was offered for sale. The State of Minnesota contended that it could only be determined whether or not the animal was healthy by inspecting the animal before slaughter. It also contended that it had a right to have this fact determined by its own inspectors and that it was too inconvenient and expensive for its inspectors to go to Illinois and other states and inspect the animal before slaughter. This contention was rejected by the United States Supreme Court and this Court stated at page 458:

> "On the contrary, the enactment of a similar statute by each one of the States composing the Union would result in the destruction of commerce among the several States, so far as such commerce is involved in the transportation from one part of the country to another of animal meats designed for human food, and entirely free from disease. * * * When to this is added the fact that the Statute, by its necessary operation, prohibits the sale, in the State, of fresh beef, veal, mutton, lamb or pork, from animals that may have been inspected carefully and thoroughly in the State where they were slaughtered, and before they were slaughtered, no doubt can remain as to its effect upon commerce among the several States. *It will not do to say—certainly no judicial tribunal can, with propriety, assume—that the people of Minnesota may not, with due regard to their health, rely upon inspections in other States of animals there slaughtered for purposes of human food.* If the object of the Statute had been to deny altogether to the citizens of other States the privilege of selling, within the limits of Minnesota, for human food, any fresh beef, veal, mutton, lamb or pork, from animals slaughtered outside of that State, and to compel the people of Minnesota, wishing to buy such meats, either to purchase those taken from

> animals inspected and slaughtered in the State, or to incur the cost of purchasing them, when desired for their own domestic use, at points beyond the State, that object is attained by the Act in question. Our duty to maintain the Constitution will not permit us to shut our eyes to these obvious and necessary results of the Minnesota Statute. If this legislation does not make such discrimination against the products and business of other States in favor of the products and business of Minnesota, as interferes with and burdens commerce among the several States, it would be difficult to enact legislation that would have that result."

In the lower courts, the case of *Miller* v. *Williams,* 12 Federal Supp. 236 held unconstitutional a regulation of the Health Commissioner of Baltimore City which prohibited the use or sale of cream for the manufacture of ice cream produced by dairies situated more than fifty miles from the City limits. The plaintiff, a citizen of Pennsylvania, with principal place of business at Philadephia, sought an injunction against the regulation. The City defended upon the ground that "there are more than 4,000 dairy farms within the 50 mile limit from Baltimore and the number of available inspectors is, as a matter of reasonable expense, necessarily limited. With regard to distantly located dairy plants, for instance those in Wisconsin, it is said to be impossible to make such frequent inspections and to carry on such educational work as is possible within a limited distance from Baltimore City." Judge Chestnut held the regulation to be in conflict with both the Due Process and Interstate Commerce Clauses of the Constitution. In his opinion, he stated:

> "In my opinion the regulation is invalid, when attacked as unreasonable by a directly interested party producing milk within the State of Maryland (in the absence of a state statute) outside the zone

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or from the point of view of being a direct burden upon interstate commerce. From the latter aspect, the applicable principles of constitutional law are now well settled. Freedom of commerce between the states is the rule and not the exception. Under the Constitution it may be regulated by Congress but unless otherwise specifically so regulated, the states may exercise their police power by statute and may authorize their municipal corporations to do so by ordinances, provided the latter are reasonably adapted to the legitimate end of protecting the health, morals and welfare of the community. But when local regulations under the guise of police power are not reasonably adapted to accomplish these legitimate ends and constitute a direct burden upon interstate commerce, they must fall, 12 C. J. 52, 60, 81. The principle here involved has been very recently applied by the Supreme Court of the United States to interstate shipments of milk in the case of *Baldwin, Commissioner* v. *Seelig,* 294 U. S. 511, 55 S. Ct. 497, 79 L. Ed. 1032. There a statute of New York which required a minimum price to be paid producers of milk within the State and further provided that no milk from other states should be sold in New York unless the same minimum prices were paid to producers in foreign states, was held unconstitutional as applied to interstate shipments of milk from Vermont, when sold in the original package, whether in the cans in which transported or as milk bottled therefrom. Said Mr. Justice Cardozo (294 U. S. 511, pages 521, 522, 55 S. Ct. 497, 499, 79 L. Ed. 1032):

'New York is equally without power to prohibit the introduction within her territory of milk of wholesome quality acquired in Vermont, whether at high prices or at low ones. * * * Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported. Imposts or duties upon commerce with other countries are placed, by an express prohibi-

tion of the Constitution, beyond the power of a state, "except what may be absolutely necessary for executing its inspection Laws." Constitution, art 1, § 10, cl. 2; *Woodruff* v. *Parham*, 8 Wall. 123, 19 L. Ed. 382. Imposts and duties upon interstate commerce are placed beyond the power of a state, without the mention of an exception, by the provision committing commerce of that order to the power of the Congress. Constitution, Art. 1 §8, cl. 3. "It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business." • • • Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. Such an obstruction is direct by the very terms of the hypothesis. We are reminded in the opinion below that a chief occasion of the commerce clauses was "the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation." '

• • • • •

"If the principle of this regulation is once established as to milk it could seemingly be extended to other food products such as vegetables, fruits and meats, which are likewise subject, although perhaps in less stringent degree, to food inspection and exclusion laws, but only when reasonable. • • • The result might well be that Baltimore would be made an isolated sanitary area for much of its food supply, although it is certainly not intended to suggest that such an unreasonable extension of the principle is at all likely to be proposed by our very efficient Health Commissioner. The principle, however, is one that runs directly counter to the constitutional freedom of the interstate commerce."

• • • • •

"The real objection of the Health Department to the foreign cream is based on the alleged impractica-

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bility of adequate and effective supervision by its own representatives of the dairy farms which produce the milk supply from remotely situated foreign dairy plants. This of itself is not a sufficient basis for excluding the cream although very probably it would support regulations of a somewhat different nature than those applicable to the local supply which would afford every reasonable assurance to the Health Commissioner for the protection of the health of the community."

It is submitted that the provision of the Beloit Ordinance which requires milk to be pasteurized within the six mile zone is in violation of the Interstate Commerce Clause of the Constitution of the United States.

II.

The provision of the Beloit Ordinance which prohibits the sale of milk not pasteurized within the six mile zone is arbitrary, discriminatory and in violation of the 14th Amendment of the United States Constitution.

The philosophy of the opinion of both the trial and Supreme Court of Wisconsin was that the City of Beloit could make arrangements to inspect enough of the surrounding territory to supply it with milk and prohibit entry of milk originating beyond the artificial line prescribed by the Ordinance. This philosophy is set forth in the following quotation from the opinion of the Supreme Court of the State of Wisconsin:

> "It cannot be said that the city, in adopting the section in dispute, arbitrarily acted on the question of convenience, efficiency, and cost of inspection, unless we adopt the rule in the case of *Meridian* v. *Sippy*, 54 Cal. App. (2d) 214, 128 Pac. (2d) 884, *where the court said that milk production is a legitimate business and so long as persons engaged in the*

business put out a clean, pure and wholesome product it should be permitted to flow freely on the markets, unburdened by duplication of inspection and prohibitive trade barriers, which rule we do not adopt. (Italics ours).

"Counsel for appellant relies on *State ex rel. Larson* v. *City of Minneapolis, supra,* and *La Francei* v. *City of Santa Rosa,* 8 Cal. (2d) 331, 65 Pac. (2d) 1301. In each instance the city passed an ordinance restricting the sale of milk in their respective cities to that pasteurized in plants located within the city limits of the particular city. No consideration was given to the area necessary to furnish the milk, and the plants near the cities in question were arbitrarily prohibited from selling milk in the city. No inspection of the farms producing the milk was provided for in the ordinances, making the facts entirely different from those under consideration. Every ordinance must stand or fall upon its own merits. It is either reasonable or arbitrary in accordance with the facts and purposes it is intended to serve, if within the police powers of the municipality adopting it. *The area necessary to be included in the ordinance could well depend upon the population to be served, the amount of milk produced, and the location of the pasteurization plants with reference to the population to be served.* A reasonable exercise of police power is not a trade barrier, and contract rights guaranteed under the Fourteenth Amendment of the federal constitution do not have a superior right to the right of a municipality to reasonably protect the health of its citizens." (Italics ours) (R. 29).

The six mile zone was drawn without reasonable relation to the supposed object to be obtained by the city. The chief health officer of the city testified that with his present staff they would be unable to inspect the milk plant and the additional farms from which the appellant proposed to obtain his milk even though the plant and farms were located within the six mile zone.

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This means that the city arbitrarily limited the business to those who were already engaged in the business and prohibited newcomers from competing for the business.

Under the doctrine above announced by the Supreme Court of the State of Wisconsin every city and village could build a trade barrier around itself and include so much of the surrounding territory as the city deemed necessary to serve the population and to suit its own convenience as to inspection. This doctrine is not confined merely to milk, other articles of food such as meat, bakery goods, fruits and vegetables are subject to being inspected. Any article of food which the city has a right to inspect to determine its fitness for human consumption could be excluded from Interstate Commerce if it originated or was produced beyond the artificial line which the city saw fit to draw around itself.

Every decision of the Courts of last resort in this country has held such requirements to be in violation of due process of law excepting the decision here under review.

State ex rel. Larson v. *City of Minneapolis* 190 Minn. 138, 251 N. W. 121 was a mandamus to compel the respondents to issue to relator a license to sell pasteurized milk and its products within the City of Minneapolis.

The question presented involved the constitutionality of a city ordinance which made it unlawful to sell pasteurized milk in Minneapolis unless it was pasteurized in plants located within the city limits.

Petitioner's plant was located 30 miles beyond the city limits.

The trial court found that the inspection necessary to safeguard the public health:

"is attended with substantial public expense, which is greater or less according to the distance to be traveled by the inspectors for the purpose of making such inspection"

and that this ordinance was reasonable in that respect. The Supreme Court of Minnesota reversed the trial court and stated in the opinion:

"The issue, then, is limited to the question of whether or not provision by the city for adequate inspection of relator's pasteurization plant, transportation facilities, etc., is so expensive and inconvenient to the city as to justify prohibition by it of relator's established business unless he moves his pasteurization plant into the city."

"If the inspection fee is deemed insufficient, there appears to be no good reason why such insufficiency can not be remedied in a manner that would impose no unjust hardship on any one concerned. There is nothing in the record to show what, if any, inconvenience the city may be put to that would justify such a harsh requirement as provided by the ordinance. We are obliged to hold that the ordinance, in so far as it prohibits the sale of pasteurized milk or its products in the city of Minneapolis, unless the same shall have been pasteurized in a pasteurization plant located within the city limits, violated relator's constitutional rights of property and contract. The restriction contained therein goes 'beyond the reasonable demands of the occasion,' and is not adaptable to the end sought."

In the *Larson* case Ninety-seven per cent (97%) of the milk and Ninety-nine and one-tenth per cent (99.1%) of the cream consumed in the city were pasteurized in plants located within the city limits; the city had three milk inspectors, one inspected raw milk and two pasteurized milk. One of the latter spent one-half of his time on plants located outside of the city. Notwithstanding these facts the Minnesota court stated:

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> "The restriction contained therein goes 'beyond the reasonable demands of the occasion,' and *is not adaptable to the end sought.*"

The trial court in the case at bar stated in its opinion:

> "The petitioner herein has made no offer to assume or repay the additional expense necessary to have such additional inspections made." (R. 6).

The answer to that proposition is that the Beloit City Ordinance makes no provision for payment of any of the expenses of inspection, and the appellant has no control over the staffing and regulating of the Health Department of the City of Beloit.

The same argument was made in the *Larson* case and that was answered by the Supreme Court of Minnesota:

> "If the inspection fee is deemed insufficient, there appears to be no good reason why such insufficiency can not be remedied in a manner that would impose no unjust hardship on any one concerned."

Furthermore, the objection made by the trial court is not apropos to the case at bar because the license was refused to the appellant on the sole ground that the pasteurization plant from which he proposed to obtain his milk was not located within the six mile zone.

Sheffield Farms Co., Inc. v. *Seaman,* 114 N. J. L. 455, 177 A. 372 was a proceeding in *certiorari* to review the action of the Health Department of the City of Perth Amboy, N. J. in refusing to grant petitioner a permit to sell and distribute its milk in Perth Amboy.

The Health Department refused the permit because it did not have sufficient personnel or funds to inspect petitioner's milk. The Department was already inspecting 21 duly licensed distributors, 350 licensed retailers and 2,000 separate sources of milk.

The city had an adequate supply of milk and the price was fixed by the State Milk Control Board.

The Supreme Court set the refusal aside, stating:

"It is next urged that the refusal was based on a sound discretion lodged in those possessing the power to grant the permit. This is not so. There is no such discretion in the granting power in the premises. Moreover, even if such an unreasonable, arbitrary, and capricious discretion were delegated or vested in the granting power it would be illegal.

"It is further contended for the respondents that the permit was refused in order to conserve public health and safety, and that the city is without funds to inspect and supervise the sources of prosecutor's supply of milk.

"Here, again, the argument finds no support in the record of the stipulated facts. Respondents concede that they have no knowledge respecting the quality of prosecutor's milk and milk products, or the sanitary condition under which its milk is produced, handled, or marketed. It clearly could not, therefore, form a judgment of refusal to grant the permit on unknown or undetermined facts. Nor does the mere lack of funds to investigate the facts justify the refusal. The Legislature has provided for such a contingency. See section 10, chapter 131, P. L. 1932, p. 222, at p. 235 N. J. St. Annual 1932, p. 81-162A (10).

"It will serve no useful purpose to answer or further discuss the purported reason argued upon which the refusal is sought to be justified. Suffice it to say that the meager facts, relevant as to the occasion and history of the refusal, lead us to the conclusion that they are without substance. They are excuses rather than legal reasons. The city just took the position that it had enough milk dealers and that it had the situation 'well in hand.' Such a position is unreasonable; it is arbitrary, capricious, and discriminatory. It unlawfully curtails prose-

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cutor's common-law right to engage in a lawful business, notwithstanding that it has fully complied with the requirements of the state and city. This the city cannot lawfully do.

"The refusal is set aside, with costs."

LaFranchi v. *City of Santa Rosa*, 8 Cal. (2d) 331, 65 P. (2d) 1301, was an action for declaratory relief. The ordinance prohibited sale of milk within Santa Rosa that was pasteurized outside of the city limits. The Supreme Court of California reversed the lower court and held the ordinance unconstitutional. After reviewing the cases from other jurisdictions the Supreme Court stated (page 1304):

"* * * In other words, it has been held quite generally that the city limits as the boundary line outside of which plants may not be located if the milk is to be sold within the city do not have a reasonable relationship to a proper legislative object and therefore ordinances fixing such a boundary are invalid.

"In line with the authorities from other jurisdictions from which we have quoted are those from our own courts declaring that ordinances designed for the purpose of erecting tariff barriers are void. * * *"

Meridian v. *Sippy*, 54 Cal. App. (2d) 214, 128 P. (2d) 884, held invalid an ordinance of the City of Stockton. The effect of the ordinance was to prevent milk from being brought beyond the boundaries of San Joaquin County and sold in Stockton. The upper court held that the ordinance violated both the California Statute and Constitution, at page 886, the court stated:

"If the position of respondent is sound, it may lead to dire results. It would be possible for every city in the State of California to erect prohibitive trade barriers around the boundary of the county

of its locale; not only milk, but many other food products designed for human consumption could be barred in this same manner. The free flow of goods from one community to another is conducive to the general prosperity and economic welfare of the state and nation. Furthermore, milk production is a legitimate business; millions of dollars in this state are invested in this industry, and so long as the persons engaged in this business put out a clean, pure and wholesome product, a way should be found to allow their products to flow freely in the market, unburdened by duplication of inspection and prohibitive trade barriers, and if the present law on our statute books can be given a reasonable construction which will bring about this result, it should be given such construction."

At page 888:

"Any ordinance or statute which prevents any person from engaging in a lawful business cannot be upheld unless protection of life, health or property makes it reasonably necessary. Such is not the case here. The contention of respondent if approved might result in the erection of trade barriers that would affect the economic prosperity of the whole state."

Grant v. *Leavell*, 259 Ky. 267, 82 S. W. (2d) 283, held invalid an ordinance of Louisville which prohibited the sale of milk from plants located outside of Louisville and not engaged in business when the ordinance was enacted. Plaintiff built his plant after the ordinance was enacted and outside of Louisville. Plaintiff sought to sell Grade A raw milk in Louisville. The court held the ordinance unreasonable and unconstitutional. At page 285 the court stated:

"The general rule as to the regulations in the sale of ordinary articles of commerce, such as milk, is only that they must be reasonable to be valid."

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"*Loaf Baking Co.* v. *Pace* (Tex. Civ. App.), 19 S. W. (2d) 459; *City of Des Moines* v. *Fowler* (Iowa), 255 N. W. 880; *Whitney* v. *Watson, et al.*, 85 N. H. 238, 157 A. 78, 80. In the last mentioned case, the principles applicable to regulation of the sale of milk were thus stated: 'Dairy products are normally legitimate subjects of commerce, interference with which is justifiable only so far as the protection of the public health requires. To that extent the Legislature may regulate and limit their sales. Beyond this, the marketing of such products is a matter of right. It is in the interest of the purchasing public as well as of the producer that a license be granted the latter when he has fulfilled the legislative requirements."

Prescott v. *City of Borger* (Tex. App.) 158 S. W. (2d) 578, involved an ordinance of the City of Borger. The ordinance prohibited sale of milk not pasteurized within the county. Plaintiff's plant was 60 miles away and in another county. The Court held the ordinance was in conflict with both the Texas Statute and Constitution.

The attorney-General of Michigan on November 6, 1946, ruled that a milk ordinance prescribing a 30 mile limit for the City of Midland, Michigan, was invalid and in conflict with the Fourteenth Amendment. We have set this opinion out in full in the appendix of this brief.

We submit that the provision of the Beloit Milk Ordinance prohibiting the sale of the milk within the city which is pasteurized in plants located outside the six mile zone is in violation of the Interstate Commerce Clause of the United States and that it deprives the appellant of his property rights and the right to contract in violation of the Fourteenth Amendment to the Constitution of the United States; that the said provision is arbitrary, unreasonable and discriminatory and that the

judgment of the Supreme Court of the State of Wisconsin should be reversed.

Respectfully submitted,

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APPENDIX.

PUBLIC HEALTH BULLETIN.
No. 220
(1939 Edition)

UNITED STATES PUBLIC HEALTH SERVICE MILK ORDINANCE

(This unabridged form of the ordinance should be adopted only where the short enabling form in part I is not considered legal.)

An ordinance defining "milk" and certain "milk products," "milk producer," "pasteurization," etc., prohibiting the sale of adulterated and misbranded milk and milk products, requiring permits for the sale of milk and milk products, regulating the inspection of dairy farms and milk plants, the examination, grading, labeling, placarding, pasteurization, regrading, distribution, and sale of milk and milk products, providing for the publishing of milk grades, the construction of future dairies and milk plants, the enforcement of this ordinance, and the fixing of penalties.

Be it ordained by the.....of the city of ..... as follows:

SECTION 1. *Definitions.*—The following definitions shall apply in the interpretation and the enforcement of this ordinance:

A. *Milk.*—Milk is hereby defined to be the lacteal secretion obtained by the complete milking of one or more

healthy cows, excluding that obtained within 15 days before and 5 days after calving, or such longer period as may be necessary to render the milk practically colostrum free; which contains not less than 8 percent of milk solids not fat, and not less than 3¼ percent of milk fat.

B. *Milk fat or butter fat.*—Milk fat or butter fat is the fat of milk.

C. *Cream and sour cream.*—Cream is a portion of milk which contains less than 18 percent milk fat. Sour cream is cream the acidity of which is more than 0.20 percent, expressed as lactic acid.

D. *Skimmed milk.*—Skimmed milk is milk from which a sufficient portion of milk fat has been removed to reduce its milk-fat percentage to less than 3¼ percent.

E. *Milk or skimmed-milk beverage.*—A milk beverage or a skimmed-milk beverage is a food compound or confection consisting of milk or skimmed milk, as the case may be, to which has been added a sirup or flavor consisting of wholesome ingredients.

F. *Buttermilk.*—Buttermilk is a product resulting from the churning of milk or cream, or from the souring or treatment by a lactic acid or other culture of milk, skimmed milk, reconstituted skimmed milk, evaporated or condensed milk or skimmed milk, or milk or skimmed-milk powder. It contains not less than 8 percent of milk solids not fat.

G. *Vitamin D milk.*—Vitamin D milk is milk the vitamin D content of which has been increased by a method and in an amount approved by the health officer.

H. *Reconstituted or recombined milk and cream.*—Reconstituted or recombined milk is a product resulting

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from the recombining of milk constituents with water, and which complies with the standards for milk fat and solids not fat of milk as defined herein. Reconstituted or recombined cream is a product resulting from the combination of dried cream, butter, or butter fat with cream, milk, skimmed milk, or water.

I. *Goat milk.*—Goat milk is the lacteal secretion, free from colostrum, obtained by the complete milking of healthy goats, and shall comply with all the requirements of this ordinance. The word "cows" shall be interpreted to include goats.

J. *Homogenized milk.*—Homogenized milk is milk which has been treated in such manner as to insure break-up of the fat globules to such an extent that after 48 hours storage no visible cream separation occurs on the milk and the fat percentage of the top 100 cc. of milk in a quart bottle, or of proportionate volumes in containers of other sizes, does not differ by more than 5 percent of itself from the fat percentage of the remaining milk as determined after thorough mixing.

K. *Milk products.*—Milk products shall be taken to mean and include cream, sour cream, homogenized milk, goat milk, vitamin D milk, buttermilk, skimmed milk, reconstituted or recombined milk and cream, milk beverages, skimmed-milk beverages, and any other product made by the addition of any substance to milk or any of these products and used for similar purposes and designated as a milk product by the health officer.

L. *Pasteurization.*—The terms "pasteurization," "pasteurized," and similar terms shall be taken to refer to the process of heating every particle of milk or milk products to at least 143° F., and holding at such tem-

perature for at least 30 minutes, or to at least 160° F., and holding at such temperature for at least 15 seconds, in approved and properly operated equipment: *Provided*, That nothing contained in this definition shall be construed as disbarring any other process which has been demonstrated to be equally efficient and is approved by the State health authority.

M. *Adulterated milk and milk products.*—Any milk or milk product which contains any unwholesome substance, or which if defined in this ordinance does not conform with its definition, or which carries a grade label unless such grade label has been awarded by the health officer and not revoked, shall be deemed adulterated and misbranded.

N. *Milk producer.*—A milk producer is any person who owns or controls one or more cows a part or all of the milk or milk products from which is sold or offered for sale.

O. *Milk distributor.*—A milk distributor is any person who offers for sale or sells to another any milk or milk products for human consumption as such.

P. *Dairy or dairy farm.*—A dairy or dairy farm is any place or premises where one or more cows are kept, a part or all of the milk or milk products from which is sold or offered for sale.

Q. *Milk plant.*—A milk plant is any place or premises or establishment where milk or milk products are collected, handled, processed, stored, bottled, pasteurized, or prepared for distribution.

R. *Health officer.*—The term "health officer" shall mean the health authority of the city of....., or his authorized representative.

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S. *Average bacterial plate count, direct microscopic count, reduction time, and cooling temperature.*—Average bacterial plate count and average direct microscopic count shall be taken to mean the logarithmic average, and average reduction time and average cooling temperature shall be taken to mean the arithmetic average, of the respective results of the last four consecutive samples, taken upon separate days, irrespective of the date of grading or regrading.

T. *Grading period.*—The grading period shall be such period of time as the health officer may designate within which grades shall be determined for all milk and milk products, provided that the grading period shall in no case exceed 6 months.

U. *Person.*—The word "person" as used in this ordinance shall mean "person, firm, corporation, or association."

V. *And/or.*—Where the term "and/or" is used "and" shall apply where possible, otherwise "or" shall apply.

SEC. 2. *The sale of adulterated milk, or ungraded milk or milk products prohibited.*—No person shall within the city of ....., or its police jurisdiction, produce, sell, offer, or expose for sale, or have in possession with intent to sell, any milk or milk product which is adulterated, misbranded, or ungraded. It shall be unlawful for any person, elsewhere than in a private home, to have in possession any adulterated, misbranded, or ungraded milk or milk product.

SEC. 3. *Permits.*—It shall be unlawful for any person to bring into or receive into the city of ....., or its police jurisdiction, for sale, or to sell, or offer for sale therein, or to have in storage where milk or milk products are sold or served, any milk or milk product defined

in this ordinance, who does not possess a permit from the health officer of the city of .....

Only a person who complies with the requirements of this ordinance shall be entitled to receive and retain such a permit.

Such a permit may be suspended by the health officer, or revoked after an opportunity for a hearing by the health officer, upon the violation by the holder of any of the terms of this ordinance.

SEC. 4. *Labeling and placarding.*—All bottles, cans, packages, and other containers enclosing milk or any milk product defined in this ordinance shall be plainly labeled or marked with (1) the name of the contents as given in the definitions in this ordinance; (2) the grade of the contents; (3) the word "pasteurized" only if the contents have been pasteurized; (4) the word "raw" only if the contents are raw; (5) the phrase "for pasteurization" if the contents are to be pasteurized; (6) the name of the producer if the contents are raw, and the name of the plant at which the contents were pasteurized, if the contents are pasteurized; and (7) in the case of Vitamin D milk, the designation "Vitamin D Milk" and the source of the vitamin D. The label or mark shall be in letters of a size, kind, and color approved by the health officer and shall contain no marks or words which are misleading.

Every restaurant, cafe, soda fountain, or other establishment serving milk or milk products shall display at all times, in a place designated by the health officer, a notice approved by the health officer, stating the lowest grade of milk and/or milk products served.[4]

[4] Cities in which only grade A pasteurized milk or only certified milk and grade A pasteurized milk are permitted to be sold may delete this paragraph and nevertheless be recognized as having adopted this ordinance.

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SEC. 5. *Inspection of dairy farms and milk plants for the purpose of grading or regrading.*—At least once during each grading period the health officer shall inspect all dairy farms and all milk plants whose milk or milk products are intended for consumption within the city of ....., or its police jurisdiction. In case the health officer discovers the violation of any item of sanitation, he shall make a second inspection after a lapse of such time as he deems necessary for the defect to be remedied, but not before the lapse of 3 days; and the second inspection shall be used in determining the grade of milk and/or milk products. Any violation of the same item of this ordinance on two consecutive inspections shall call for immediate degrading.

One copy of the inspection report shall be posted by the health officer in a conspicuous place upon an inside wall of one of the dairy farm or milk plant buildings, and said inspection report shall not be defaced or removed by any person except the health officer. Another copy of the inspection report shall be filed with the records of the health department.

SEC. 6. *The examination of milk and milk products.*—During each grading period at least four samples of milk and cream from each dairy farm and each milk plant shall be taken on separate days and examined by the health officer. Samples of other milk products may be taken and examined by the health officer as often as he deems necessary. Samples of milk and milk products from stores, cafes, soda fountains, restaurants, and other places where milk or milk products are sold shall be examined as often as the health officer may require. Bacterial plate counts and direct microscopic counts shall be made in conformity with the latest standard methods recommended by the American Public Health Associ-

ation.[5] Examinations may include such other chemical and physical determinations as the health officer may deem necessary for the detection of adulteration, these examinations to be made in accordance with the latest standard methods of the American Public Health Association and the Association of Official Agricultural Chemists.[5] Samples may be taken by the health officer at any time prior to the final delivery of the milk or milk products. All proprietors of stores, cafes, restaurants, soda fountains, and other similar places shall furnish the health officer, upon his request, with the names of all distributors from whom their milk and milk products are obtained. Bio-assays of the vitamin D content of vitamin D milk shall be made when required by the health officer in a laboratory approved by him for such examinations.

Whenever the average bacterial count, the average reduction time, or the average cooling temperature falls beyond the limit for the grade then held, the health officer shall send written notice thereof to the person concerned, and shall take an additional sample, but not before the lapse of 3 days, for determining a new average in accordance with section 1 (S). Violation of the grade requirement by the new average or by any subsequent average during the remainder of the current grading period shall call for immediate degrading or suspension

[5] Municipalities in which the adoption of legislation by reference is not considered legal may substitute the following wording: "* * * in conformity with the regulations of the health officer (or board of health)." If the regulations then adopted by the health officer are equivalent to those contained in the reference thus replaced, they will not be considered as constituting a downward revision of the U. S. Public Health Service milk ordinance.

All other references in this ordinance to standards and methods not specifically described may be treated in the same manner, such as the requirements of the American Association of Medical Milk Commissions under the definition of certified milk-raw, the requirements of the Bureau of Animal Industry relative to accredited herds and modified accredited areas in item 1r, and the U. S. Public Health Service milk code in section 15.

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of the permit, unless the last individual result is within the grade limit.

SEC. 7. *The grading of milk and milk products.*—At least once every 6 months the health officer shall announce the grades of all milk and milk products delivered by all producers or distributors and ultimately consumed within the city of ....., or its police jurisdiction. Said grades shall be based upon the following standards, the grading of milk products being identical with the grading of milk except that the bacterial standards shall be doubled in the case of cream, and omitted in the case of sour cream and buttermilk. Vitaman D milk shall be only of grade A or grade B pasteurized, certified, or grade A raw quality.

Certified milk-raw.—Certified milk-raw is raw milk which conforms with the requirements of the American Association of Medical Milk Commissions* in force at the time of production and is produced under the supervision of a medical milk commission and of the State board of health or of the city or county health officer of .....

Grade A raw milk.—Grade A raw milk is raw milk the average bacterial plate count of which as determined under sections 1 (S) and 6 of this ordinance does not exceed 50,000 per cubic centimeter, or the average direct microscopic count of which does not exceed 50,000 per cubic centimeter if clumps are counted or 200,000 per cubic centimeter if individual organisms are counted, or the average reduction time of which is not less than 8 hours: *Provided,* That if it is to be pasteurized the corresponding limits shall be 200,000 per cubic centimeter, 200,000 per cubic centimeter, 800,000 per cubic

* See footnote 5, p. 7.

centimeter, and 6 hours, respectively; and which is produced upon dairy farms conforming with all of the following items of sanitation.

ITEM 1 r. *Cows, tuberculosis and other diseases.*—Except as provided hereinafter, a tuberculin test of all herds and additions thereto shall be made before any milk therefrom is sold, and at least once every 12 months thereafter, by a licensed veterinarian approved by the State livestock sanitary authority. Said tests shall be made and reactors disposed of in accordance with the requirements approved by the United States Department of Agriculture, Bureau of Animal Industry,[6] for accredited herds. A certificate signed by the veterinarian or attested to by the health officer and filed with the health officer shall be evidence of the above test: *Provided*, That in modified accredited counties in which the modified accredited area plan is applied to the dairy herds the modified accredited area system approved by the United States Bureau of Animal Industry[6] shall be accepted in lieu of annual testing.

Within .....[7] years after the adoption of this ordinance all milk and milk products consumed raw shall be from herds or additions thereto which have been found free from Bang's disease, as shown by blood serum tests for agglutinins against *Brucella abortus* made in a laboratory approved by the health officer. All such herds shall be retested at least every 12 months and all reactors removed from the herd. A certificate identifying each animal by number, and signed by the laboratory making the test, shall be evidence of the above test.

Cows which show an extensive or entire induration of one or more quarters of the udder upon physical exami-

[6] See footnote 5, p. 7.

[7] The number should be inserted when the ordinance is adopted. It should not exceed 5 years if the community wishes to be recognized as having adopted this ordinance.

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nation, whether secreting abnormal milk or not, shall be permanently excluded from the milking herd. Cows giving bloody, stringy, or otherwise abnormal milk, but with only slight induration of the udder, shall be excluded from the herd until re-examination shows that the milk has become normal.

For other diseases such tests and examinations as the health officer may require shall be made at intervals and by methods prescribed by him, and any diseased animals or reactors shall be disposed of as he may require.

ITEM 2r. *Dairy barn, lighting.*—A dairy or milking barn shall be required and in such sections thereof where cows are milked windows shall be provided and kept clean and so arranged as to insure adequate light properly distributed, and when necessary shall be provided with adequate supplementary artificial light.

ITEM 3r. *Dairy barn, air space and ventilation.*—Such sections of all dairy barns where cows are kept or milked shall be well ventilated and shall be so arranged as to avoid overcrowding.

ITEM 4r. *Dairy barn, floors.*—The floors and gutters of such parts of all dairy barns in which cows are milked shall be constructed of concrete or other approved impervious and easily cleaned material, provided that if the milk is to be pasteurized tight wood may be used, shall be graded to drain properly, and shall be kept clean and in good repair. No horses, pigs, fowl, calves, etc., shall be permitted in parts of the barn used for milking.

ITEM 5r. *Dairy barn, walls and ceilings.*—The walls and ceilings of all dairy barns shall be whitewashed once

each year or painted once every 2 years, or oftener, if necessary, or finished in an approved manner, and shall be kept clean and in good repair. In case there is a second story above that part of the barn in which cows are milked the ceiling shall be tight. If the feed room adjoins the milking space, it shall be separated therefrom by a dust-tight partition and door. No feed shall be stored in the milking portion of the barn.

ITEM 6r. *Dairy barn, cowyard.*—All cowyards shall be graded and drained as well as practicable and kept clean.

ITEM 7r. *Manure disposal.*—All manure shall be removed and stored or disposed of in such manner as best to prevent the breeding of flies therein or the access of cows to piles thereof.

ITEM 8r. *Milk house or room, construction.*—There shall be provided a milk house or milk room in which the cooling, handling, and storing of milk and milk products and the washing, bactericidal treatment, and storing of milk containers and utensils shall be done. (*a*) The milk house or room shall be provided with a tight floor constructed of concrete or other impervious material, in good repair, and graded to provide proper drainage. (*b*) It shall have walls and ceilings of such construction as to permit easy cleaning, and shall be well painted or finished in an approved manner. (*c*) It shall be well lighted and ventilated. (*d*) It shall have all openings effectively screened including outward-opening, self-closing doors, unless other effective means are provided to prevent the entrance of flies. (*e*) It shall be used for no other purposes than those specified above except as may be approved by the health officer; shall not open directly into a stable or into any room used for domestic

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purposes; shall, unless the milk is to be pasteurized, have water piped into it; shall be provided with adequate facilities for the heating of water for the cleaning of utensils; shall be equipped with two-compartment stationary wash and rinse vats, except that in the case of retail raw milk, if chlorine is employed as the principal bactericidal treatment, the three-compartment type must be used; and shall, unless the milk is to be pasteurized, be partitioned to separate the handling of milk and the storage of cleansed utensils from the cleaning and other operations, which shall be so located and conducted as to prevent any contamination of the milk or of cleaned equipment.

ITEM 9r. *Milk house or room, cleanliness and flies.*—The floors, walls, ceilings, and equipment of the milk house or room shall be kept clean at all times. All means necessary for the elimination of flies shall be used.

ITEM 10r. *Toilet.*—Every dairy farm shall be provided with one or more sanitary toilets conveniently located and properly constructed, operated, and maintained, so that the waste is inaccessible to flies and does not pollute the surface soil or contaminate any water supply.

ITEM 11r. *Water supply.*—The water supply for the milk room and dairy barn shall be properly located, constructed, and operated, and shall be easily accessible, adequate, and of a safe sanitary quality.

ITEM 12r. *Utensils, construction.*—All multi-use containers or other utensils used in the handling, storage, or transportation of milk or milk products must be made of smooth nonabsorbent material and of such construction as to be easily cleaned, and must be in good repair. Joints and seams shall be soldered flush. Woven wire cloth shall not be used for straining milk. All milk

pails shall be of a small-mouth design approved by the health officer. The manufacture, packing, transportation, and handling of single-device containers and container caps and covers shall be conducted in a sanitary manner.

ITEM 13r. *Utensils, cleaning.*—All multi-use containers, equipment, and other utensils used in the handling, storage, or transportation of milk and milk products must be thoroughly cleaned after each usage.

ITEM 14r. *Utensils, bactericidal treatment.*—All multi-use containers, equipment, and other utensils used in the handling, storage, or transportation of milk or milk products shall between each usage be subjected to an approved bactericidal process with steam, hot water, chlorine, or hot air.

ITEM 15r. *Utensils, storage.*—All containers and other utensils used in the handling, storage, or transportation of milk or milk products shall be stored so as not to become contaminated before being used.

ITEM 16r. *Utensils, handling.*—After bactericidal treatment no container or other milk or milk product utensil shall be handled in such manner as to permit any part of any person or his clothing to come in contact with any surface with which milk or milk products come in contact.

ITEM 17r. *Milking, udders and teats, abnormal milk.*—The udders and teats of all milking cows shall be clean and rinsed with a bactericidal solution at the time of milking. Abnormal milk shall be kept out of the milk supply and shall be so handled and disposed of as to preclude the infection of the cows and the contamination of milk utensils.

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ITEM 18r. *Milking, flanks.*—The flanks, bellies, and tails of all milking cows shall be free from visible dirt at the time of milking.

ITEM 19r. *Milkers' hands.*—Milkers' hands shall be clean, rinsed with a bactericidal solution, and dried with a clean towel immediately before milking and following any interruption in the milking operation. Wet-hand milking is prohibited. Convenient facilities shall be provided for the washing of milkers' hands.

ITEM 20r. *Clean clothing.*—Milkers and milk handlers shall wear clean outer garments while milking or handling milk, milk products, containers, utensils, or equipment.

ITEM 21r. *Milk stools.*—Milk stools shall be kept clean.

ITEM 22r. *Removal of milk.*—Each pail of milk shall be removed immediately to the milk house or straining room. No milk shall be strained or poured in the dairy barn.

ITEM 23r. *Cooling.*—Milk must be cooled immediately after completion of milking to 50° F. or less, and maintained at that average temperature, as defined in section 1 (S), until delivery. If milk is delivered to a milk plant or receiving station for pasteurization or separation, it must be delivered within 2 hours after completion of milking or cooled to 70° F. or less and maintained at that average temperature until delivered.

ITEM 24r. *Bottling and capping.*—Milk and milk products shall be bottled from a container with a readily cleanable valve, or by means of an approved bottling machine. Bottles shall be capped by machine. Caps or cap stock shall be purchased in sanitary containers and kept therein in a clean dry place until used.

ITEM 25r. *Personnel, health.*—The health officer or a physician authorized by him shall examine and take a careful morbidity history of every person connected with a retail raw dairy, or about to be employed, whose work brings him in contact with the production, handling, storage, or transportation of milk, milk products, containers, or equipment. If such examination or history suggests that such person may be a carrier of or infected with the organisms of typhoid or paratyphoid fever or any other communicable diseases likely to be transmitted through milk, he shall secure appropriate specimens of body discharges and cause them to be examined in a laboratory approved by him or by the State health authorities for such examinations, and if the results justify such person shall be barred from such employment.

Such persons shall furnish such information, submit to such physical examinations, and submit such laboratory specimens as the health officer may require for the purpose of determining freedom from infection.

ITEM 26r. *Miscellaneous.*—All vehicles used for the transportation of milk or milk products shall be so constructed and operated as to protect their contents from the sun and from contamination. All vehicles used for the transportation of milk or milk products in their final delivery containers shall be constructed with permanent tops and with permanent or roll-down sides and back, provided that openings of the size necessary to pass the delivery man may be permitted in the sides or back for loading and unloading purposes. All vehicles shall be kept clean, and no substance capable of contaminating milk or milk products shall be transported with milk or milk products in such manner as to permit contamination. All vehicles used for the distribution of milk or milk prod-

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ucts shall have the name of the distributor prominently displayed.

The immediate surroundings of the dairy shall be kept in a neat, clean condition.

Grade B raw milk.—Grade B raw milk is raw milk which violates the bacterial standard and/or the abortion testing requirement for grade A raw milk, but which conforms with all other requirements for grade A raw milk, and has an average bacterial plate count not exceeding 1,000,000 per cubic centimeter, or an average direct microscopic count not exceeding 1,000,000 per cubic centimeter if clumps are counted or 4,000,000 per cubic centimeter if individual organisms are counted, or an average reduction time of not less than 3½ hours, as determined under sections 1 (S) and 6.

Grade C raw milk.—Grade C raw milk is raw milk which violates any of the requirements for grade B raw milk.

Certified milk-pasteurized.—Certified milk-pasteurized is certified milk-raw which has been pasteurized, cooled, and bottled in a milk plant conforming with the requirements for grade A pasteurized milk.

Grade A pasteurized milk.—Grade A pasteurized milk is grade A raw milk, with such exceptions as are indicated if the milk is to be pasteurized, which has been pasteurized, cooled, and bottled in a milk plant conforming with all of the following items of sanitation and the average bacterial plate count of which at no time after pasteurization and until delivery exceeds 30,000 per cubic centimeter, as determined under sections 1 (S) and 6.

The grading of a pasteurized milk supply shall include the inspection of receiving and collecting stations with

respect to items 1p to 15p, inclusive, and 17p, 19p, 22p, and 23p, except that the partitioning requirement of item 5p shall not apply.

ITEM 1p. *Floors.*—The floors of all rooms in which milk or milk products are handled or stored or in which milk utensils are washed shall be constructed of concrete or other equally impervious and easily cleaned material and shall be smooth, properly drained, provided with trapped drains, and kept clean.

ITEM 2p. *Walls and ceilings.*—Walls and ceilings of rooms in which milk or milk products are handled or stored or in which milk utensils are washed shall have a smooth, washable, light-colored surface and shall be kept clean.

ITEM 3p. *Doors and windows.*—Unless other effective means are provided to prevent the access of flies, all openings into the outer air shall be effectively screened and doors shall be self-closing.

ITEM 4p. *Lighting and ventilation.*—All rooms shall be well lighted and ventilated.

ITEM 5p. *Miscellaneous protection from contamination.*—The various milk-plant operations shall be so located and conducted as to prevent any contamination of the milk or of the cleaned equipment. All means necessary for the elimination of flies shall be used. There shall be separate rooms for (*a*) the pasteurizing, processing, cooling, and bottling operations, and (*b*) the washing and bactericidal treatment of containers. Cans of raw milk shall not be unloaded directly into the pasteurizing room. Pasteurized milk or milk products shall not be permitted to come in contact with equipment with which unpasteurized milk or milk products have been in contact, unless such

equipment has first been thoroughly cleaned and subjected to bactericidal treatment. Rooms in which milk, milk products, cleaned utensils, or containers are handled or stored shall not open directly into any stable or living quarters. The pasteurization plant shall be used for no other purposes than the processing of milk and milk products and the operations incident thereto, except as may be approved by the health officer.

ITEM 6p. *Toilet facilities.*—Every milk plant shall be provided with toilet facilities conforming with the ordinances of the city of ..... Toilet rooms shall not open directly into any room in which milk, milk products, equipment, or containers are handled or stored. The doors of all toilet rooms shall be self-closing. Toilet rooms shall be kept in a clean condition, in good repair, and well ventilated. In case privies or earth closets are permitted and used, they shall be separate from the building, and shall be of a sanitary type constructed and operated in conformity with the requirements of item 10r, grade A raw milk.

ITEM 7p. *Water supply.*—The water supply shall be easily accessible, adequate, and of a safe, sanitary quality.

ITEM 8p. *Hand-washing facilities.*—Convenient hand-washing facilities shall be provided, including warm running water, soap, and approved sanitary towels. The use of a common towel is prohibited.

ITEM 9p. *Sanitary piping.*—All piping used to conduct milk or milk products shall be "sanitary milk piping" of a type which can be easily cleaned with a brush. Pasteurized milk and milk products shall be conducted from one piece of equipment to another only through sanitary milk piping.

ITEM 10p. *Construction and repair of containers and equipment.*—All multi-use containers and equipment with which milk or milk products come in contact shall be constructed in such manner as to be easily cleaned and shall be kept in good repair. The manufacture, packing, transportation, and handling of single-service containers and container caps and covers shall be conducted in a sanitary manner.

ITEM 11p. *Disposal of wastes.*—All wastes shall be properly disposed of.

ITEM 12p. *Cleaning and bactericidal treatment of containers and equipment.*—All milk and milk products containers and equipment, except single-service containers, shall be thoroughly cleaned after each usage. All containers shall be subjected to an approved bactericidal process after each cleaning and all equipment immediately before each usage. When empty and before being returned to a producer by a milk plant each container shall be effectively cleaned and subjected to bactericidal treatment.

ITEM 13p. *Storage of containers and equipment.*—After bactericidal treatment all bottles, cans, and other multi-use milk or milk-products containers and equipment shall be stored in such manner as to be protected from contamination.

ITEM 14p. *Handling of containers and equipment.*—Between bactericidal treatment and usage, and during usage, containers and equipment shall not be handled or operated in such manner as to permit contamination of the milk.

ITEM 15p. *Storage of caps, parchment paper, and single-service containers.*—Milk-bottle caps or cap stock, parchment paper for milk cans, and single-service con-

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tainers shall be purchased and stored only in sanitary tubes and cartons, respectively, and shall be kept therein in a clean dry place.

ITEM 16p. *Pasteurization.*—Pasteurization shall be performed as described in section 1 (L) of this ordinance.

ITEM 17p. *Cooling.*—All milk and milk products received for pasteurization shall immediately be cooled in approved equipment to 50° F. or less and maintained at that temperature until pasteurized, unless they are to be pasteurized within 2 hours after receipt; and all pasteurized milk and milk products shall be immediately cooled in approved equipment to an average temperature of 50° F. or less, as defined in section 1 (S), and maintained thereat until delivery.

ITEM 18p. *Bottling.*—Bottling of milk and milk products shall be done at the place of pasteurization in approved mechanical equipment.

ITEM 19p. *Overflow milk.*—Overflow milk or milk products shall not be sold for human consumption.

ITEM 20p. *Capping.*—Capping of milk and milk products shall be done by approved mechanical equipment. Hand capping is prohibited. The cap or cover shall cover the pouring lip to at least its largest diameter.

ITEM 21p. *Personnel, health.*—The health officer or a physician authorized by him shall examine and take a careful morbidity history of every person connected with a pasteurization plant, or about to be employed, whose work brings him in contact with the production, handling, storage, or transportation of milk, milk products, containers, or equipment. It such examination or history suggests that such person may be a carrier of or infected with the organisms of typhoid or paratyphoid fever or

any other communicable diseases likely to be transmitted through milk, he shall secure appropriate specimens of body discharges and cause them to be examined in a laboratory approved by him or by the State health authorities for such examinations, and if the results justify such person shall be barred from such employment.

Such persons shall furnish such information, submit to such physical examinations, and submit such laboratory specimens as the health officer may require for the purpose of determining freedom from infection.

ITEM 22p. *Personnel, cleanliness.*—All persons coming in contact with milk, milk products, containers, or equipment shall wear clean outer garments and shall keep their hands clean at all times while thus engaged.

ITEM 23p. *Miscellaneous.*—All vehicles used for the transportation of milk or milk products shall be so constructed and operated as to protect their contents from the sun and from contamination. All vehicles used for the transportation of milk or milk products in their final delivery containers shall be constructed with permanent tops and with permanent or roll-down sides and back, provided that openings of the size necessary to pass the delivery man may be permitted in the sides or back for loading and unloading purposes. All vehicles shall be kept clean, and no substance capable of contaminating milk or milk products shall be transported with milk or milk products in such manner as to permit contamination. All vehicles used for the distribution of milk or milk products shall have the name of the distributor prominently displayed.

The immediate surroundings of the milk plant shall be kept in a neat, clean condition.

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Grade B pasteurized milk.—Grade B pasteurized milk is pasteurized milk which violates the bacterial standard for Grade A pasteurized milk and/or the provision of lip-cover caps of item 20p and/or the requirement that grade A raw milk be used, but which conforms with all other requirements for grade A pasteurized milk, has been made from raw milk of not less than grade B quality, and has an average bacterial plate count after pasteurization and before delivery not exceeding 50,000 per cubic centimeter, as determined under sections 1 (S) and 6.

Grade C pasteurized milk.—Grade C pasteurized milk is pasteurized milk which violates any of the requirements for grade B pasteurized milk.

SEC. 8. *Grades of milk and milk products which may be sold.*—From and after 12 months from the date on which this ordinance takes effect no milk or milk products shall be sold to the final consumer or to restaurants, soda fountains, grocery stores, or similar establishments except[8]: *Provided*, That when any milk distributor fails to qualify for one of the above grades the health officer is authorized to revoke his permit,[9] or in lieu thereof to degrade his product and permit its sale during a temporary period not exceeding 30 days or in emergencies such longer period as he may deem necessary.

SEC. 9. *Supplementary grading prescribed and regrading authorized.*—If, at any time between the regular announcements of the grades of milk or milk products, a lower grade shall become justified, in accordance with sections 5, 6, and 7 of this ordinance, the health officer shall immediately lower the grade of such milk or milk

[8] See footnote 2, p. 2.
[9] See footnote 2, p. 2.

products, and shall enforce proper labeling and placarding thereof.

Any producer or distributor of milk or milk products the grade of which has been lowered by the health officer, and who is properly labeling his milk and milk products, may at any time make application for the regrading of his product.

Upon receipt of a satisfactory application, in case the lowered grade is the result of an excessive average bacterial plate count, direct microscopic count, reduction time, or cooling temperature, the health officer shall take further samples of the applicant's output, at a rate of not more than two samples per week. The health officer shall regrade the milk or milk products upward whenever the average of the last four sample results indicates the necessary quality, but not before the lapse of 2 weeks from the date of degrading.

In case the lowered grade of the applicant's product is due to a violation of an item of the specifications prescribed in section 7, other than average bacterial plate count, direct microscopic count, reduction time, or cooling temperature, the said application must be accompanied by a statement signed by the applicant to the effect that the violated item of the specifications has been conformed with. Within 1 week of the receipt of such an application and statement the health officer shall make a reinspection of the applicant's establishment, and thereafter as many additional reinspections as he may deem necessary to assure himself that the applicant is again complying with the higher grade requirements, and, in case the findings justify, shall regrade the milk or milk products upward, but not before the lapse of 2 weeks from the date of degrading.

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SEC. 10. *Transferring or dipping milk; delivery containers; handling of more than one grade; delivery of milk at quarantined residences.*—Except as permitted in this section, no milk producer or distributor shall transfer milk or milk products from one container to another on the street, or in any vehicle or store, or in any place except a bottling or milk room especially used for that purpose. The sale of dip milk is hereby prohibited.

All pasteurized milk and milk products shall be placed in their final delivery containers in the plant in which they are pasteurized, and all raw milk and milk products sold for consumption in the raw state shall be placed in their final delivery containers at the farm at which they are produced. Milk and milk products sold in the distributor's containers in quantities less than 1 gallon shall be delivered in standard milk bottles or in single-service containers. It shall be unlawful for hotels, soda fountains, restaurants, groceries, and similar establishments to sell or serve any milk or milk product except in the original container in which it was received from the distributor or from a bulk container equipped with an approved dispensing device: *Provided*, That this requirement shall not apply to cream consumed on the premises, which may be served from the original bottle or from a dispenser approved for such service.

It shall be unlawful for any hotel, soda fountain, restaurant, grocery, or similar establishment to sell or serve any milk or milk products which have not been maintained, while in its possession, at a temperature of 50° F. or less.

No milk or milk products shall be permitted to come in contact with equipment with which a lower grade of milk or milk products has been in contact unless such equipment has first been thoroughly cleaned and subjected to bactericidal treatment.

Bottled milk or milk products, if stored in water, shall be so stored that the tops of the bottles will not be submerged.

It shall be the duty of all persons to whom milk or milk products are delivered to clean thoroughly the containers in which such milk or milk products are delivered before returning such containers. Apparatus, containers, equipment, and utensils used in the handling, storage, processing, or transporting of milk or milk products shall not be used for any other purpose without the permission of the health officer.

The delivery of milk or milk products to and the collection of milk or milk products containers from residences in which cases of communicable disease transmissible through milk supplies exist shall be subject to the special requirements of the health officer.

SEC. 11. *Milk and milk products from points beyond the limits of routine inspection.*—Milk and milk products from points beyond the limits of routine inspection of the city of.....may not be sold in the city of....., or its police jurisdiction, unless produced and/or pasteurized under provisions equivalent to the requirements of this ordinance: *Provided,* That the health officer shall satisfy himself that the health officer having jurisdiction over the production and processing is properly enforcing such provisions.

SEC. 12. *Future dairies and milk plants.*—All dairies and milk plants from which milk or milk products are supplied to the city of.....which are hereafter constructed, reconstructed, or extensively altered shall conform in their construction to the requirements of this ordinance for grade A dairy farms producing

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milk for consumption in the raw state, or for grade A pasteurization plants, respectively: *Provided,* That the requirement of a two-room milk house shall be waived in the case of dairies the milk from which is to be pasteurized. Properly prepared plans for all dairies and milk plants which are hereafter constructed, reconstructed, or extensively altered shall be submitted to the health officer for approval before work is begun. In the case of milk plants signed approval shall be obtained from the health officer and/or the State health department.

SEC. 13. *Notification of disease.*—Notice shall be sent to the health officer immediately by any producer or distributor of milk or milk products upon whose dairy farm or in whose milk plant any infectious, contagious, or communicable disease occurs.

SEC. 14. *Procedure when infection suspected.*—When suspicion arises as to the possibility of transmission of infection from any person concerned with the handling of milk or milk products, the health officer is authorized to require any or all of the following measures: (1) The immediate exclusion of that person from milk handling, (2) the immediate exclusion of the milk supply concerned from distribution and use, (3) adequate medical and bacteriological examination of the person, of his associates, and of his and their body discharges.

SEC. 15. *Enforcement interpretation.*—This ordinance shall be enforced by the health officer in accordance with the interpretations thereof contained in the 1939 edition of the United States Public Health Service Milk Code, a certified copy of which shall be on file in the city clerk's office.[10]

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[10] See footnote 6, p. 7.

SEC. 16. *Penalty.*—Any person who shall violate any provision of this ordinance shall be fined not more than .....at the discretion of the court. Each and every violation of the provisions of this ordinance shall constitute a separate offense.

SEC. 17. *Repeal and date of effect.*—All ordinances and parts of ordinances in conflict with this ordinance are hereby repealed; and this ordinance shall be in full force and effect immediately upon its adoption and its publication, as provided by law.

SEC. 18. *Unconstitutionality clause.*—Should any section, paragraph, sentence, clause, or phrase of this ordinance be declared unconstitutional or invalid for any reason, the remainder of said ordinance shall not be affected thereby.

Opinion of Attorney General of Michigan.

ORDINANCES.

(Milk)

A city ordinance providing that no license shall be granted to a milk producer whose dairy farm is more than thirty miles from the city and whose plant is located outside of the city, is violative of the constitutional rights of property and contract of a dealer whose plant is located outside the city. It is further discriminatory, and therefore invalid.

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o-5105 November 6, 1946

William DeKleine, M. D., Commissioner
Michigan Department of Health
Dewitt Road
Lansing 4, Michigan

Dear Dr. DeKleine:

We understand from your inquiry relative to the Michigan Model Milk Ordinance that the city of Midland adopted such ordinance and is now considering amending the ordinance by inserting a section to read as follows:

> "No license required by this section shall be granted except upon certification by the Health Officer, and no license shall be granted to a producer whose dairy farm is more than thirty miles from the city unless, in the opinion of the Health Officer, an emergency exists which necessitates a greater milk-shed area, or to a processer, bottler or distributor, not now engaged in said business, whose plant is located outside of the city."

You state that the city attorney of Midland does not feel inclined to approve this proposed section and that he will not do so without the recommendation of your department. You therefore question as to the advisability of making such a recommendation.

It is my opinion that such a provision in the ordinance, as is presented, would be discriminatory, violative of the constitutional rights of property and contract, and unenforceable.

While our Michigan Supreme Court has not passed precisely on this particular question, in the case of *Cook Coffee Co.* v. *Flushing*, 267 Mich. 131, it was said by the court:

> "It has been repeatedly held that a provision in an ordinance discriminating in favor of residents as against non-residents is in violation of constitutional prohibition and invalid." (Citing *Brooks* v. *Mangan*, 86 Mich. 576; *City of Saginaw* v. *Saginaw Circuit Judge*, 106 Mich. 32; and *Goldstein* v. *City of Hamtramck*, 227 Mich. 263.)

It has likewise been held in many jurisdictions that a classification in an ordinance based on location of its place of business is void. In the case of *Miller* v. *Williams*, 12 Fed. Supp. 236, a regulation of a city health commissioner similar to the ordinance under consideration was before the court. This regulation had been made under a city ordinance which ordinance had been upheld by the courts, and provided, among other things, that persons dealing in milk and cream in Baltimore City must obtain permits from the health commissioner. In this case, it was held that a regulation of a city health commission, prohibiting the sale of cream in the city for use in the manufacture of ice cream unless produced within a fifty mile radius of the city, was invalid as to shipper from another state as a direct burden on interstate commerce. The court further said in connection with this regulation:

> "In my opinion the regulation is invalid, when attacked as unreasonable by a directly interested party producing milk within the state of Maryland (in the absence of a state statute) outside the zone or from the point of view of being a direct burden upon interstate commerce."

Your further attention is called to the case of *Grant* v. *Leavell*, 259 Ky. 267, where the court held that the refusal to grant a permit for the sale of milk within the city, solely upon the ground that the applicant had constructed his milk plant since the ordinance had been

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passed and had not located it within the city where it would be more accessible for easy and frequent inspection, was held to be discriminatory, and therefore invalid. In the case of *Ex. Rel. Larsen* v. *Minneapolis*, 190 Minn. 138, it was held that a provision in the city ordinance which prohibits the sale of pasteurized milk or its products within the city, unless the milk has been pasteurized in a plant located within the city limits, violates the constitutional rights of property and contract of a dealer whose plant is located outside the city.

Very truly yours,

Foss O. Eldred,
Attorney General.

By John A. Bradshaw,
Deputy Attorney General.